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Sub-Commission on the Promotion
and Protection of Human Rights
Fifty-third session
Item 3 of the provisional agenda

ADMINISTRATION OF JUSTICE

Question of human rights and states of emergency

List of States which have proclaimed or continued a state of emergency

Report of the Office of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights decision 1998/108

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Introduction

1. The present report is prepared pursuant to decision 1998/108 of the Commission on Human Rights, which requested the Office of the United Nations High Commissioner for Human Rights to submit to the fifty-first session of the then Sub-Commission on the Prevention of Discrimination and Protection of Minorities, and every second year thereafter, a list of States in which a state of emergency was proclaimed or continued during the reporting period.

2. Under article 4 (3) of the International Covenant on Civil and Political Rights, States parties availing themselves of the right of derogation are to inform the other States parties immediately, through the Secretary-General, of the derogations it has made, including the reasons therefor and the date on which the derogations are terminated. However, for the period between July 1999 and May 2001, only a few notifications were received by the Secretary-General.

3. The Office of the United Nations High Commissioner for Human Rights has relied on information provided by United Nations sources, non-governmental organizations and international news agencies to draw up the requested list of States.

I. COUNTRIES OR TERRITORIES IN WHICH A STATE OF EMERGENCY HAD BEEN PROCLAIMED BEFORE JULY 1999 AND CONTINUED THEREAFTER

Algeria

The state of emergency decreed in 1992 is still in effect.

Source: Amnesty International Annual Report 2000.

Egypt

The state of emergency declared in 1981 remains in force.

Source: Amnesty International Annual Report 2000.

Indonesia

A state of emergency was declared on 27 June 2000 to cover the north and south areas of the Moluku islands, where religious violence broke out.

Source: International news agencies.

Israel

The state of emergency proclaimed in May 1948 has remained in force, notably in the occupied territories. The measure is extended regularly for 12 months.

Sources: Concluding observations of the Human Rights Committee on Israel 1998, and international news agencies.

Sierra Leone

On 10 March 2001, Parliament extended the state of emergency in place for six months, due to continuing fighting in different regions of the country.

Source: International news agencies.

Sri Lanka

A state of emergency has been in force for long periods since May 1983. The measure is extended monthly by Parliament due to the ongoing civil war that mostly affects the northern region of the country. Information was received on the derogation from articles 9 (2), 9 (3), 12 (1), 12 (2), 14 (3), 17 (1), 19 (2), 21 and 22.

Source: Notification of the Government to the United Nations Secretary-General dated 30 May 2000 and international news agency.

Syrian Arab Republic

Legislative Decree No. 51 of 9 March 1963 declaring a state of emergency is still in force.

Source: Concluding observations of the Human Rights Committee, 5 April 2001.

Turkey

The state of emergency in five provinces is in force, the measure being lifted in a sixth province in December.

Source: Amnesty International Annual Report 2000.

II. COUNTRIES OR TERRITORIES IN WHICH A STATE OF EMERGENCY WAS PROCLAIMED BETWEEN JULY 1999 AND MAY 2001

Bolivia

8 April 2000

A state of siege was declared by the President for 90 days after violent protests broke out in relation to economic issues, particularly a privatization project and anticipated sharp rises in water rates.

13 April 2000

The measure was approved by Congress.

20 April 2000

The Council of Ministers agreed to lift the state of siege.

Source: International news agencies.

Botswana

On 2 September 1999, a state of emergency was declared by the President to allow around 60,000 people to register for the 16 October general election. The measure was lifted on 6 September 1999, after it was decided to amend the Electoral Act.

Source: International news agencies.

Cote d'Ivoire

21 July 2000

A four-day state of emergency was declared by the military ruler who came to power after a coup d'état in December. The decision was taken in light of a forthcoming referendum on a new constitution.

4 December 2000

A state of emergency was declared in response to political unrest. A curfew was in place from 4 to 12 December.

8 January 2001

After a coup attempt, the Government imposed a curfew to last three nights.

Source: United Nations Integrated Regional Information Network (IRIN) and international news agencies.

Ecuador

5 July 1999

Presidential Decree 1041 declared the private and public transport systems in a state of emergency throughout the country in order to deal with a transport strike and to guarantee order, public safety, and the safeguard of public and private property.

6 July 1999

Presidential Decree 1051 extended the state of emergency in the Province of Guayas.

13 July 1999

Congress revoked Presidential Decrees 1041 and 1051.

13 July 1999

Presidential Decree 1070 declared a national state of emergency.

17 July 1999

Decree 1088 terminated the national state of emergency.

30 November 1999

A state of emergency in Guayas Province was established by Decree 1557 which indicated that the measure was taken in response to the serious internal disturbance which had produced a massive crime wave that continued to affect that province.

Subsequently, on 28 January 2000, the Government of Ecuador specified that the provisions from which it had derogated were articles 12 (1) and 17 (1) of the Covenant.

5 January 2000

Presidential Decree 1674 declared a national state of emergency that was motivated by the serious internal unrest caused by the economic crisis which Ecuador was experiencing.

The Government of Ecuador specified that the provisions from which it had derogated were articles 12 (1), 17 (1), 21 and 22 (1).

31 January 2000

Presidential Decree 30 extended the state of emergency in the Province of Guayas for 60 days.

2 February 2001

A state of national emergency was declared by Executive Decree 1214. The Decree stipulated that the measure was adopted to overcome the adverse consequences of the economic crisis affecting Ecuador which had created a situation of serious internal unrest.

The Government of Ecuador specified that the provisions from which it had derogated were articles 12, 17 and 21 of the Covenant.

9 February 2001

Executive Decree 1228 lifted the state of national emergency.

Source: Notifications of the Government to the United Nations Secretary-General dated 27 August and 9 December 1999, 6 and 28 January 2000, and 21 February 2001; Ecuador Official Registry; and Centro de Documentación en Derechos Humanos "Segundo Montes Mozo S.J.".

Fiji

The President declared a state of emergency on 19 May 2000 after a coup attempt. A curfew was imposed from 8 p.m. to 5 a.m. in Suva, the capital.

Martial law was declared by the military on 30 May 2000. Between June and early November, a curfew remained in force but the hours were relaxed. On 2 November, there was an attempted mutiny. With the existing curfew in place, additional curfew hours were imposed from 8 p.m. on 2 November to 5 a.m. on 4 November. The curfew was lifted on 16 December.

At the end of May 2001, the Emergency Decree was still in effect.

Source: UNDP Suva Office and international news agencies.

Indonesia

On 7 September 1999, martial law was imposed in East Timor by the Government of Indonesia in order to try to stop the violence and turmoil in the territory which had started after the results of a referendum, favouring independence, were made public. The measure was lifted on 23 September 1999.

Source: International news agencies.

Liberia

A state of emergency was declared on 19 July 2000 in the northern town of Voinjama, due to fighting in Lofa County.

Source: IRIN.

Namibia

A state of emergency was declared on 9 August 1999 by the President in the Caprivi region for an initial period of 30 days, due to circumstances having arisen in this region that caused a public emergency threatening the life of the nation and the constitutional order.

Information was received on the derogation from articles 9 (2) and 9 (3) of the Covenant.

25 August 1999

Proclamation 27 revoked the declaration of a state of emergency and emergency regulations in Caprivi promulgated by Proclamations 23 and 24.

Source: Notifications of the Government to the United Nations Secretary-General dated 5 August and 10 September 1999.

Pakistan

A state of emergency was imposed throughout the country on 15 October 1999 by the military rulers who had come to power in a coup d'état. The measure suspended the National Assembly, the provincial assemblies and the Senate, and named General Pervez Musharraf as chief executive officer.

Source: International news agencies.

Paraguay

19 May 2000

Presidential Decree 8772 declared a state of siege throughout the country for 30 days. The decision to declare a state of siege was taken due to an attempted coup d'état.

20 May 2000

Congress approved Decree 8772.

21 May 2000

Presidential Decree 8778 stipulated that all meetings should be previously authorized by the police. However, meetings of activists and followers of the Unión Nacional de Colorados Eticos (UNACE) political movement were prohibited during the state of siege.

1 June 2001

Presidential Decree 8936 lifted the national state of emergency.

Source: International news agencies.

Peru

4 January 2000

The state of emergency was established and extended in various districts, provinces and departments of Peru, due to civil unrest.

Information was received on the derogation from articles 12, 17, 21 and 29 of the Covenant.

2 March 2000

The state of emergency was extended in several provinces of Peru during the months of January and February 2000, in response to continuing civil unrest and in order to complete the process of pacification in these areas of the country, and in particular in order to ensure the rational use of natural resources, particularly timber in the area of Tahuamanú Province in the Department of Madre de Dios.

Information was received on the derogation from articles 9, 12, 17 and 21 of the Covenant.

4 July

The state of emergency was established for a period of 30 days in the Iñapari district, Tahuamanu Province, Department of Madre de Dios. The decree stipulated that the measure was necessary to protect citizens and ensure peace and internal order in view of the presence of subversive armed groups.

Information was received on the derogation from articles 9, 12, 17 and 21 of the Covenant.

The state of emergency in force in several areas of the country was rescinded.

Source: Notifications of the Government to the United Nations Secretary-General dated 1 February, 4 January, 28 April and 25 July 2000; concluding observations of the Human Rights Committee, 1 November 2000.

Philippines

On 1 May 2001, the President declared a state of rebellion to cover Manila, the capital, due to violent street demonstrations. On 7 May 2001, the state of rebellion was lifted.

Source: International news agencies.

Russian Federation

16 August 1999

The President of the Republic of Chechnya declared a state of emergency with a 30-day duration that included a curfew to deal with an escalating military conflict.

Sudan

3 January 2001

The national state of emergency in place was extended for a year. This measure has been in effect since December 1999, when Parliament was dissolved and parts of the Constitution suspended.

Source: (IRIN).

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Corrigendum

The paragraph that makes reference to the Russian Federation should be deleted.

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Agenda item 3

ADMINISTRATION OF JUSTICE

Report of the sessional working group on the administration of justice

Chairperson-Rapporteur: Mr. Yozo Yokota

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Introduction

1. By decision 2001/102 of 31 July 2001, the Sub-Commission on the Promotion and Protection of Human Rights decided to establish a sessional working group on the administration of justice. With the agreement of the Sub-Commission members, the Chairman, Mr. David Weissbrodt, appointed the following experts as members of the working group: Ms. Françoise Hampson (Western European and other States), Ms. Antoanella Iulia Motoc (Eastern Europe), Mr. Paulo Pinheiro (Latin America), Mr. Yozo Yokota (Asia), Ms. Leïla Zerrougui (Africa).

2. The following members of the Sub-Commission also took part in the discussions in the working group: Mr. Alonso Gómez-Robledo Verduzco, Mr. El-Hadji Guissé, Mr. Louis Joinet, Mr. Miguel Alfonso Martínez, Mr. Yeung Kam Yeung Sik Yuen.

3. The working group held two public meetings, one on 5 August and the other on 9 August 2001. An additional meeting, for the adoption of the provisional agenda of the next session and the present report, was held on 10 August 2001.

4. A representative of the Office of the High Commissioner for Human Rights opened the session of the working group. The working group elected, by consensus, Mr. Yokota as Chairperson-Rapporteur for its 2001 session.

5. Representatives of the following non-governmental organizations took the floor during the debate: International Commission of Jurists, Pax Romana, Association of World Citizens, War Resisters International.

6. The working group had before it the following documents:

Report of the 2001 sessional working group on the administration of justice (E/CN.4/Sub.2/2000/44);

Improvement and efficiency of the judicial instruments for the protection of human rights at the national level and their impact at the international level - Part 2: report prepared by Mr. Héctor Fix-Zamudio (E/CN.4/Sub.2/2001/WG.1/CRP.2);

Discrimination in the criminal justice system: working paper prepared by Ms. Leïla Zerrougui (E/CN.4/Sub.2/2001/WG.1/CRP.1);

Rapport interimaire relatif à l'administration de la justice par les tribunaux militaire, by Mr. Louis Joinet (E/CN.4/Sub.2/2001/WG.1/CRP.3).

7. The following documents were submitted during the session: "Domestic implementation in practice of the obligation to provide effective domestic remedies" and "The accountability of armed forces, United Nations civilian police and international civil servants taking part in peace support operations", by Ms. Hampson; "Follow-up report on the death penalty", by Mr. Guissé.

Adoption of the agenda

8. At its first meeting, the working group considered the provisional agenda contained in document E/CN.4/Sub.2/2000/44. On the proposal of Ms. Hampson, a new topic, that of the functioning and accountability of United Nations peace support operations, was added to the agenda. With this addition, the agenda for the session was adopted as follows:

1. Issues relating to the deprivation of the right to life, with special reference to:

   (a) Imposition of the death penalty;

   (b) Summary, arbitrary and extrajudicial executions.

2. Privatization of prisons: annually updated report.

3. Improvement and efficiency of the judicial instruments for the protection of human rights at the national level and their impact at the international level.

4. Administration of justice through military tribunals and other exceptional jurisdictions.

5. The domestic implementation in practice of the obligation to provide domestic remedies.

6. Functioning and accountability of United Nations peace support operations.

7. Discrimination in the criminal justice system.

8. Provisional agenda for the next session.

9. Adoption of the report of the working group to the Sub-Commission.

9. At the request of Ms. Hampson, the discussion on items 5 and 6 was postponed until after that on item 7. At the suggestion of the Chairperson-Rapporteur, which reflected the general view of the members of the working group, it was agreed not to discuss item 2 at the present session.

I. ISSUES RELATING TO THE DEPRIVATION OF THE RIGHT TO LIFE, WITH SPECIAL REFERENCE TO: (A) IMPOSITION OF THE DEATH PENALTY; (B) SUMMARY, ARBITRARY AND EXTRAJUDICIAL EXECUTIONS

Imposition of the death penalty: follow-up report by Mr. Guissé

10. Mr. Guissé made an oral presentation, a written version of which was later distributed among the members of the working group. He reported that some 54 countries had abolished the death penalty. However, many others still retained or had re-established it, among them the

United States and some of its states; 97 per cent of those countries applied the death penalty for various common crimes. It was especially grave that the application of the death penalty was often accompanied by massive media coverage and publicity, to the point that it could not be said whether the execution was aimed at discouraging potential criminals or at taunting the consciousness of humanity. If the main objective was to intimidate, the effect actually achieved was the opposite.

11. There were also countries in which mass executions covered by the press were used as part of a strategy to fight criminality. Such media coverage of executions constituted a form of torture over and above the death penalty. Mr. Guissé suggested the adoption of a resolution requesting the Commission to request all States to prohibit the publicizing of executions.

12. Mr. Guissé also reported that pregnant women, minors and mentally handicapped people were executed in many countries. In the United States, for instance, the death penalty had racial connotations as around 80 per cent of those sentenced to capital punishment were black. That practice constituted racial discrimination.

13. Mr. Guissé praised and encouraged the European practice, and the European campaign for the abolition of the death penalty. It was noteworthy that criminality had not increased in European countries as a result of that abolitionist policy, which showed that there were alternative and equally effective means of fighting criminality and punishing those who had committed crimes. He underlined the role of the Sub-Commission in encouraging such developments.

14. Several members of the working group and the Sub-Commission took the floor to comment on Mr. Guissé's follow-up report. Mr. Joinet endorsed Mr. Guissé's position on the media coverage of executions. He stated that it was a matter that affected the human dignity of the convicted person, regardless of his or her guilt. Mr. Goonesekere agreed, but expressed the view that freedom of expression of the media must be preserved. He also noted that sometimes publicity helped to raise public awareness and thereby saved people from execution. He observed that many persons who committed serious crimes were executed a long time afterwards. By bringing those issues to the public attention, the media could play a positive role.

15. Mr. Guissé explained that his criticism was confined to media coverage of the execution itself; he approved of the positive role that the media could play at the previous stages. The procedures, and the whole trial, should be the subject of media coverage because such coverage was necessary to help people on death row.

16. At the Chairman's invitation, the representatives of two non-governmental organizations took the floor. The representative of the Association of World Citizens expressed concern that, notwithstanding the international campaign to prohibit the execution of mentally handicapped people, such executions had continued, as had executions of minors and pregnant women. The representative of War Resisters International drew attention to cases of executions of deserters, noted that some countries had entered reservations to the Second Optional Protocol to the International Covenant on Civil and Political Rights in that regard and appealed to those countries to withdraw them.

II. IMPROVEMENT AND EFFICIENCY OF JUDICIAL INSTRUMENTS FOR THE PROTECTION OF HUMAN RIGHTS AT THE NATIONAL LEVEL AND THEIR IMPACT AT THE INTERNATIONAL LEVEL

17. Under this item, the working group considered the second report submitted by Mr. Fix-Zamudio (E/CN.4/Sub.2/2001/WG.1/CRP.2). Mr. Alonso Gómez-Robledo Verduzco, as alternate to Mr. Fix-Zamudio, presented an oral summary of the document to the working group.

18. Mr. Gómez-Robledo Verduzco pointed out that the report focused on the conditions necessary for the mechanisms established for human rights protection to be effective. International instruments set out minimum standards on this matter. In that regard, it was necessary to consider general judicial guarantees applicable to the protection of all rights, together with those specially designed for the protection of human rights. Several international instruments addressed ordinary judicial guarantees. Among the essential elements they had in common was the holding of a fair hearing within a reasonable time by an impartial and competent tribunal. With regard to the protection of fundamental rights and freedoms, universal and regional instruments established that everyone had the right to effective and rapid judicial recourse against violations of his or her rights. There was thus a link between procedures at the national level and the provisions of international instruments that set standards to ensure effectiveness. Some of the standards referred to access to justice as the need to ensure that those whose rights had been violated actually had recourse to the courts, and there was a trend towards the establishment of mechanisms of legal and financial assistance to that end. It could be concluded that a judicial "social security" system was being established. In classic constitutionalism, the procedural right to bring an action was purely formal. The current trend was to consider that right as a human right to justice, and not merely a formal right to go to court or to have recourse to public conflict-resolution bodies. In that context, judges had adopted a more active role in the process through the application of the principle that they knew the law and must apply it even when the parties did not invoke it correctly.

19. Due process of law was an Anglo-American concept that had had a great impact on the legal order in other regions, e.g. Latin America. It was also known as the right to a fair hearing. An essential element for the effectiveness of mechanisms of protection was the concept of the competent, impartial and independent judge. The principle of the competent (also called natural) judge implied that people could not be tried by ad hoc, special or military tribunals but must be tried by tribunals established prior to the events. The requirement of an independent and impartial judge had been recognized in domestic legal orders and international instruments. For instance, the United Nations had adopted in 1985 the Basic Principles on the Independence of the Judiciary, which required all governmental agencies to respect judicial independence. It was also essential for the procedures to be simple, brief and to be held within a reasonable time (i.e. without undue delays). Although those guarantees originally applied to personal freedom, they had been extended to other rights but were not easy to implement in all cases, despite the efforts made. One obstacle in that regard was the excessive formalism and the cumbersome nature of procedures. Although some work to reform the courts and the relevant legislation had been carried out, it had been only relatively successful.

20. Notwithstanding efforts to reduce it, there was a high backlog of cases. Most of the time decisions were not implemented expeditiously. In that regard, consideration should be given to the jurisprudence of the Inter-American and European Courts of Human Rights, which had found that serious delays constituted violations of the respective conventions.

21. A last element essential for the effectiveness of the mechanisms of human rights protection related to the enforcement of and compliance with international decisions at the national level. Compliance with international decisions was not easy because the public authorities called upon to enforce the decision were the same ones involved in the violations. There was a need to enact national legislation to address issues of compliance and the enforcement of decisions or recommendations of international bodies. There had been some progress in Latin America in that regard, e.g. the national legislation of Peru, Colombia and Venezuela.

22. Mr. Guissé observed that justice had two faces, depending on whether the accused was in a developing or developed country. People without financial means to ensure their defence would be denied due process of law. That applied especially in cases involving deprivation of personal liberty. The protection of such individuals should start at the stage of their detention by the police. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment would be the applicable international standard. It was at that stage that violations of rights started, with far-reaching consequences for the rest of the process. When the individual did not have the necessary financial means to defend his or her case, it was impossible to ensure the protection of his or her rights and the rest of the proceedings would be biased against him or her. Those without means would spend their lives in prison, where they would probably be abused even more. There were, however, safeguards to protect individual rights during detention: habeas corpus, amparo, etc. The Sub-Commission should remind States of the existence of those mechanisms and of the need to provide legal aid for persons accused of any crimes, not only serious crimes.

23. Mr. Alfonso Martínez asked whether an in-depth study could be done on the matter and underlined the need for further exploration of procedural guarantees. Commenting on paragraph 38 of the report, he observed with approbation that respect of procedural guarantees was the only way to provide a remedy for the wrong done to an individual. The guarantee of the right to appear before a court and the guarantee that the defence would be carried out properly were essential elements. The reference to the existing legal order (para. 40 of the report) as the need to ensure that sentences were consistent with existing substantive law would involve the working group in the complex question of whether the existing legal order in a given country was adequate or not. It would be more advisable to focus on two other questions: was the accused able to defend him/herself in an adversarial process? Is legality ensured in practice, or only formally?

24. Mr. Joinet made some observations on the content of the report. First, the title of the study, "improvement" of judicial instruments, appeared to refer to the action by the State at the national level. As to the "efficiency" of international instruments, the question was, what was the role of the national judge in that regard? Once the State had ratified an international convention, subject to the reservations made the national judge must apply the rule of superiority of international norms over national law. That had happened, for instance, in France. While a

State had not ratified the relevant international convention the national judge might not apply the international norm. Therefore, in assessing effectiveness, there were two stages: first, when the judge first applied the international norm (sometimes following the jurisprudence of the higher courts) and second, when he became accustomed to applying them as a matter of ordinary law.

25. Mr. Sik Yuen observed that the paper covered a very broad range of issues. He also observed that the inequality present in real life was reflected in the judicial system. There was no general principle of equality, but rather a right to equal protection of the law. When it came to the application of the law, whether a person was rich or poor was irrelevant. Mr. Sik Yuen also commented on the principle of independence and impartiality of the judiciary. What made an institution work was the quality of the people who ran them. There was also a normal interplay between the different branches of government, which could not be seen as interference. As to the need to avoid undue delays, he underlined that justice delayed was justice denied. There was also a pressing need to do away with overly bureaucratic and obsolete procedures. In common law systems an examining magistrate referred the case to a trial court once he had determined the existence of a prima facie case. That process took a long time and might need to be reformed. Concerning Mr. Guissé's comments, Mr. Sik Yuen observed that a case started once an enquiry had been made and procedural guarantees should be observed at that stage. Enquiries were conducted by police officers who in most countries were not under judicial control. In some systems, the fact that the police were under the home affairs ministry might prevent them from carrying out an independent and thorough investigation.

26. Ms. Zerrougui, commenting on Mr. Joinet's observations on the application of international instruments by the national judge, said that in regions in which there were no international courts, the question was whether there was a domestic law implementing the provisions of the ratified international instrument. Without implementing legislation, the ratification had no practical effect.

27. Mr. Gómez-Robledo Verduzco made some final remarks and noted the primary importance of national norms and institutions in the protection of human rights, the international mechanisms being a complement to them. Domestic remedies could theoretically be used by everyone, but their full use would only be possible with the provision of advice and legal aid. He observed, on the issue of reservations to human rights treaties, that a forthright prohibition of such reservations would be desirable, but recalled the existing tension between the need for universal ratification and the need to preserve the integrity of the treaty.

III. ADMINISTRATION OF JUSTICE THROUGH MILITARY TRIBUNALS AND OTHER EXCEPTIONAL JURISDICTIONS

28. Mr. Joinet presented his report, stressing its preliminary character and noting some technical problems in the document.

29. In his 1969 report to the Sub-Commission on equality before the courts, Mr. Abu Rannat had provided remarkable insights about the role of military tribunals. A recent decision of the South African Supreme Court, finding that the trial of military officers by military tribunals was discriminatory since their rights could not be equally guaranteed in those courts, appeared to confirm Mr. Abu Rannat's insights.

30. The first part of Mr. Joinet's interim report reviewed international norms and their application by international bodies, as well as national norms and jurisprudence such as those of Argentina, Colombia and South Africa. He stated that he had found more than he expected in that regard. The Human Rights Committee, for instance, used to consider that military jurisdictions per se were not contrary to the provisions of the International Covenant on Civil and Political Rights, but in view of the serious violations taking place in the context of their activities, the Committee had changed its position. The interim report cited several of the Committee's decisions in that regard. The final report would therefore look at the positive developments rather than at the criticisms that might be raised with regard to military tribunals. Such an approach would help everyone in the task of making military justice compatible with international standards. Mr. Joinet proposed to identify the trends and, in a second part, to elaborate guidelines or benchmarks for Governments engaged in the reform of their military justice systems.

31. The second part of the interim report looked at the doctrine and jurisprudence of international, regional and national bodies. The next report would provide a typology of diverse military tribunals. The latter was important because the evolution of military justice was linked to national history; France had had a national security court, and it had taken some time to abolish it. The typology would also allow the identification of the best ways to support and accelerate the positive evolution that was taking place. At a first stage, and with the support of the International Commission of Jurists, Mr. Joinet had prepared a long questionnaire, but had modified it to contain fewer and simpler questions. The sources for the study would be those available within the United Nations system: the database of treaty bodies and the Charter-based bodies, as well as thematic and country reports submitted by special procedures. Military law journals would also be a useful source.

32. Ms. Hampson stressed the importance of the issues dealt with by the interim report. In that regard, one source to consider was the case law of the European Court of Human Rights. The jurisprudence of the Court had recently addressed the question of whether it was appropriate for a military judge to sit on a tribunal to judge a civilian. The European Court had ruled that it was not appropriate because the civilian would have concerns about the lack of independence of the military judge. That ruling was important for other European countries. Second, the Court had established that the guarantees of due process would apply in criminal cases heard by courts martial. Ms. Hampson also underlined the importance of the jurisprudence of the Human Rights Committee and the case law of the Inter-American and the European Courts of Human Rights insofar as their views and decisions on individual cases could be expected to apply consistently to other cases. She suggested that the study also consider that it might be possible to convene a court martial wherever the suspect happened to be: some summary procedures could be held overseas. She asked about the criteria adopted by the Swiss military court that had found a citizen of Rwanda guilty of genocide.

33. Ms. Zerrougui expressed the hope that next year's report would look at crimes committed abroad; she evoked the case of United States servicemen accused of rape in Japan. She also mentioned the case of children being tried in Israel under criminal charges as one that deserved to be analysed.

34. Mr. Gómez-Robledo Verduzco agreed that military courts had undergone far-reaching reforms limiting their powers to judge civilians and were now more in line with international standards on due process.

35. Mr. Guissé said that the composition of military tribunals was varied and a distinction should be made between the tribunals chaired by civilians and those military tribunals composed of military officers to try other military officers. He suggested that the power of military tribunals to try civilians and minors be analysed.

36. The representative of the International Commission of Jurists commended the report but noted that some important instruments, such as the draft convention on forced disappearances, which contained provisions restricting the power of military courts, had not been taken into consideration. The International Commission of Jurists offered its collaboration in holding seminars of experts, including military officers, to discuss the issues. The representative of War Resisters International stated that the best solution was abolishing such courts, as had been done in South Africa. He suggested that the case of deserters and conscientious objectors to military service who were tried and severely punished should be further analysed in the proposed study. The representative of Pax Romana supported the analysis of the accountability of international peacekeeping operations, as well as of the role and responsibility of foreign armed forces stationed in the Republic of Korea and Japan, among others. There had been a number of criminal cases in the two countries involving United States servicemen that could not have been tried by the national courts.

37. Ms. Hampson commented that before abolishing military tribunals, which had the power to try service personnel stationed abroad, it should be ensured that civilian tribunals were granted the power to try them. In the United Kingdom, civilian tribunals had only limited jurisdiction over crimes committed abroad by United Kingdom citizens. Regarding the case of conscientious objectors, she suggested that the study analyse cases of multiple jeopardy involving that category of people. Further, in some countries people under 18 were allowed to serve in the armed forces and would therefore potentially be subject to court martial. That issue should be covered in the questionnaire.

38. Mr. Joinet welcomed and commented briefly on the comments and suggestions made. He later distributed a modified version of the interim report which incorporated the contributions made during the discussion in the working group.

39. The Chairperson reminded the working group of paragraph 46 of the previous year's report which read as follows: "The working group approved the working document and decided to ask Mr. Joinet to submit at its next session an interim report under item 6 of the provisional agenda. The final report, taking into account the suggestions made by the participants, should be submitted in 2002. It could eventually be submitted to the Sub-Commission at its fifty-fourth session for consideration".

IV. DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM

40. Ms. Zerrougui first explained the general organization of her working paper and the procedure followed in its preparation. The main sources were the human rights treaty body reports and documents, as well as previous reports submitted to the Commission and Sub-Commission. Documents of other United Nations bodies and specialized agencies had also been useful. A future study on the matter would only be justified if it had as its main purpose to identify the foundations of discrimination in the criminal justice system and to recommend ways and means to overcome that situation.

41. The paper provided an overview of the place and status granted to the non-discrimination clause within international instruments in general and of the legal framework applicable to the non-discrimination principle with regard to the administration of criminal justice as provided for by international instruments. That legal framework allowed an appreciation of the degree of compatibility of national legislation with international standards. With regard to the poor and vulnerable, the application of the principle was problematic. Its full application could only be achieved by positive action on the part of Governments, which might face the problem of scarcity of resources. That problem deserved further examination.

42. The report also looked at manifestations of discrimination within the criminal justice system. The preparatory work for the World Conference against Racism had already focused on that issue and had questioned the efficiency of the criminal justice system, which did not protect victims of discrimination or offer them effective means of redress. The criminal justice system was called into question not only for failing to deal with discrimination in society but also for institutionalizing social discrimination. It reproduced social inequalities and tolerated the practice of discrimination within itself.

43. Concerning the discriminatory mechanisms within the criminal justice administration, the report identified some lines of future research. First, international norms, which were the result of inter-State cooperation and took the form of international and regional conventions, offered insufficient protection against discrimination which affected aliens in particular, as the conventions favoured nationals. Aliens were therefore discriminated against at the national level and also had no protected status at the international level. Second, the institutionalized discrimination at the national level, including passive discrimination resulting from the failure to adopt positive action to address discrimination, needed further analysis, especially when discrimination occurred in a context of scarce resources.

44. Ms. Zerrougui recalled some important issues for future research developed in her report, in particular, the need to focus on domestic norms that were discriminatory or applied in a discriminatory manner. Future research should also look at the rules and jurisprudence of the International Criminal Tribunal for the Former Yugoslavia which provided for new procedures that allowed for the protection of victims and witnesses.

45. Ms. Motoc suggested that a fully developed report be submitted to the Sub-Commission and underlined the importance of focusing the analysis on the element of the institutional mechanisms of discrimination. Ms. Hampson raised three points. To concentrate on machinery would be useful, but that would include examining the operation of the criminal justice system,

i.e. how cases were brought to the court and how they were dealt with. In some cases, the absence of proceedings might be attributable to some form of discrimination. The grounds of discrimination considered also needed clarification. For instance, the European Court of Human Rights considered lack of means as an element that restricted access to the courts. An area of special attention was discrimination against the Roma: in another case, the European Court had found that the absence of proceedings against alleged perpetrators of violations was attributable to the applicant's being a young Roma boy. As to the protection of witnesses and the production of evidence, she considered that whether there existed mechanisms of protection of women, men and children was also revelatory of the existence of discrimination and was worth examining in the report.

46. In replying to the comments and questions made, Ms. Zerrougui expressed her agreement with the suggestion to focus on the issue of mechanisms and welcomed all contributions in that regard.

V. THE DOMESTIC IMPLEMENTATION IN PRACTICE OF THE OBLIGATION TO PROVIDE DOMESTIC REMEDIES

47. Ms. Hampson presented a short paper, circulated only in English, stating that the provision of an effective remedy was at the heart of human rights law. If duly implemented, it should ensure that there were fewer violations. In many jurisdictions it was not implemented properly. For that reason, it was recommended that the Sub-Commission authorize the preparation of a working paper on the matter. A proposal in that regard had been presented to the Sub-Commission for adoption.

48. Ms. Motoc agreed, but doubted whether it was possible to address the whole range of issues in one paper. Ms. Hampson explained in this regard that the paper would concentrate on two issues: first, the extent to which the national judge could or actually did use human rights standards when dealing with cases involving human rights violations. Would the individual be able to raise those standards in the proceedings? Second, how complaints against State officials were dealt with before they reached a court.

49. Mr. Joinet expressed concern about the number of studies to be made within the Sub-Commission. He asked the Chairperson to consult whether and to what extent the rules setting a limit of 13 studies at a given session would apply. The Chairperson suggested that the issue be discussed in the closed meeting.

VI. FUNCTIONING AND ACCOUNTABILITY OF UNITED NATIONS PEACE SUPPORT OPERATIONS

50. Ms. Hampson presented a paper, circulated only in English on the scope of the activities and the accountability of military forces, United Nations police forces and United Nations staff participating in peace support operations. The paper contained a request to the Sub-Commission to appoint an expert to submit a working paper on the subject next year. The scope of the study proposed in the paper circulated included, first, clarification and analysis of the powers granted to those actors in matters of search, detention, lawmaking, etc. With regard to the legislative authority exercised by a special representative of the Secretary General, at present he or she was

not required to respect human rights law in the exercise of his or her legislative functions. A second area of analysis would be the system of accountability of United Nations and other forces, including the problems arising when the actual responsibility lay with the States of origin: how could the United Nations obtain information and ensure administrative discipline and the exercise of criminal jurisdiction? Especially problematic was the issue of the responsibility of United Nations staff: they could not be regarded as citizens of their national State since they were functionally "stateless". A draft decision had been submitted to the Sub-Commission for adoption authorizing the preparation of a working paper for next year.

VII. PROVISIONAL AGENDA FOR THE NEXT SESSION

51. In a closed meeting on 10 August 2001, the working group agreed on its provisional agenda for its next session. Given the importance of the subject, and at the request of the working group, Mr. Alfonso Martínez agreed to submit a written report on the privatization of prisons for the 2002 session of the working group. The working group also requested Ms. Motoc to prepare an introductory working paper on transitional justice for its 2002 session. The provisional agenda is the following:

1. Election of officers.

2. Adoption of the agenda.

3. Issues related to the deprivation of the right to life, with special reference to the imposition of the death penalty.

4. Privatization of prisons.

5. Improvement and efficiency of the judicial instruments for the protection of human rights at the national level and their impact at the international level.

6. The domestic implementation in practice of the obligation to provide domestic remedies.

7. Transitional justice: mechanisms of truth and reconciliation.

8. Other issues.

9. Provisional agenda for the next session.

10. Adoption of the report.

VIII. ADOPTION OF THE REPORT OF THE WORKING GROUP TO THE SUB-COMMISSION

52. At its third meeting, on 13 August 2001, the working group unanimously adopted the present report to the Sub-Commission. The working group agreed to request the Sub-Commission to allocate two full meetings of three hours each, plus an additional session of one hour for adoption of the report, during its 2002 session. The working group further suggested that its first meeting be held on the afternoon of the first Monday of the 2002 session of the Sub-Commission.

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ADMINISTRATION OF JUSTICE

Mass and flagrant violations of human rights which constitute crimes against humanity and which took place during the colonial period, wars of conquest and slavery

Note by the Secretary-General

1. At its fifty-second session in the year 2000, the Sub-Commission on the Promotion and Protection of Human Rights requested the Secretary-General to prepare a working document relating to the mass and flagrant violations of human rights which constitute crimes against humanity and which took place during the colonial period, wars of conquest and slavery, including means and proposals which could be adopted in order to provide reparation to the victims of those violations and to honour their memory (decision 2000/114). This note is submitted in response to the request of the Sub-Commission.

Contemporary definition of crimes against humanity

2. Crimes against humanity were recognized in the Charter of the United Nations and Judgement of the Nürnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany.[1]

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3. The Statute of the International Criminal Tribunal for the Former Yugoslavia, established in 1993, grants the International Tribunal jurisdiction over crimes against humanity (art. 5) when committed in armed conflict whether of international or internal character. The Statute of the International Criminal Tribunal for Rwanda (Security Council resolution 955 (1994)), while listing the same crimes under the category of crimes against humanity (art.3), is more open on this point.

4. The Rome Statute of the International Criminal Court (A/CONF.183/9), adopted in 1999, constitutes to date the most comprehensive definition of crimes against humanity.[2] The list of crimes against humanity in the Rome Statute substantially builds on the list formulated by the International Law Commission in article 18 of its 1996 Draft Code of Crimes against the Peace and Security of Mankind,[3] with the sole exception of "forced disappearance of persons".

Issues of interest to the Sub-Commission

5. The right of peoples to self-determination has been the subject of extensive standard-setting by the General Assembly and other organs of the United Nations. Mention may be made in this regard of the relevant provisions of the Charter of the United Nations, the Declaration on the Granting of Independence to Colonial Countries and Peoples, common article 1 of the International Covenants on Human Rights, and studies submitted to the Sub-Commission on the right to self-determination.

6. United Nations organs have also given extensive attention to the legal status of combatants struggling against colonial and alien domination and racist regimes, as well as to measures used to impede the realization of the right of peoples and nations to self-determination.

7. On these and related issues, the attention of the Sub-Commission is called to the publication, United Nations Action in the Field of Human Rights,[4] in particular chapter IV, section C, entitled "Rights of peoples and nations to self-determination".

8. The topic of crimes against humanity has been extensively considered by the International Law Commission[5] and in the process of drafting the Statute of the International Criminal Court.

9. The issue of reparation for the victims of violations of human rights is one that has been extensively discussed in the Sub-Commission and in the Commission on Human Rights and continues to engage the attention of the Commission. Reference may be made in this regard to decision 2001/105 adopted by the Commission on 23 April 2001 in which it requested the United Nations High Commissioner for Human Rights to hold a consultative meeting in Geneva for all interested Governments, international organizations and non-governmental organizations in consultative status with the Economic and Social Council with a view to finalizing the "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law" annexed to the final report of the independent expert (E/CN.4/2000/62) on the basis of the comments submitted, and to transmit to the Commission at its fifty-eighth session the final outcome of the consultative meeting for its consideration.

10. Paragraph 8 of the draft basic principles and guidelines defines victims as follows:

> "A person is a 'victim' where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A 'victim' may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental or economic harm."

11. The topic of crimes against humanity that might have been committed in the past is currently the subject of debate in various forums, as is the issue of reparation for the victims of past violations.

12. It will be recalled that it was in the Sub-Commission that the basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law were first discussed. The Sub-Commission may wish to take note of the latest developments in the elaboration of the draft basic principles and guidelines and to consider whether, and how, the issue of historical violations and reparations therefor could be appropriately addressed in a manner that would help generate an international consensus on these matters.

Notes

[1] Cited in the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Add.1 and Corr.1).

[2] Article 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

[3] Yearbook of the International Law Commission, 1996 vol. II, Part Two, chap II.

[4] United Nations publication, Sales No. E.94.XIV.11.

[5] Between 1988 and 1989 the International Law Commission contemplated the inclusion of colonial domination in its Draft Code of Crimes against Peace and Security of Mankind. See Yearbook of the International Law Commission 1988, vol. II, Part Two and ibid, 1989.

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ADMINISTRATION OF JUSTICE

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Note by the Secretary-General

Corrigendum

Paragraph 2

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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Report of the sessional working group on the working methods and activities of transnational corporations on its third session

Chairperson-Rapporteur: Mr. El-Hadji Guissé

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Executive summary

In its resolution 1998/8, the Sub-Commission on the Promotion and Protection of Human Rights established in 1999, for a period of three years, a sessional working group to examine the working methods and activities of transnational corporations. At the fifty-third session of the Sub-Commission, the working group held its third session.

The working group considered papers submitted by three experts: the Chairperson-Rapporteur, Mr. Guissé, who presented a paper on the activities of transnational corporations; Mr. Eide, who presented a paper on implementation procedures for human rights guidelines; and Mr. Weissbrodt, who presented the draft guidelines themselves. After the presentation of the papers, the Chairperson-Rapporteur opened the floor for debate and contributions were made by experts and representatives of United Nations specialized agencies, non-governmental organizations and civil society.

Speakers generally welcomed the draft guidelines. There was some discussion concerning the correct title for the guidelines, with one expert proposing "draft principles". Some experts referred to the original mandate of the working group and the need to ensure that the draft guidelines and any other work of the group complied with the terms of the mandate. Some speakers questioned the strength of the draft guidelines and cautioned against introducing standards that might not meet existing human rights and labour standards. Mr. Weissbrodt welcomed all contributions and encouraged further commentary on the draft guidelines from all concerned parties including Governments, intergovernmental organizations, NGOs, trade unions and the private sector.

Many contributions referred to the appropriate coverage of the guidelines. Some speakers favoured broadening the scope of the guidelines to include domestic corporations and other business entities. Several reasons were given for this, including the difficulty in defining transnational corporations as opposed to corporations generally and the ability of transnational corporations to avoid implementing the guidelines through the use of legal structures. Speakers also noted that the activities of both transnational corporations and domestic corporations could affect the enjoyment of human rights, and so the draft guidelines should apply to both. On the other hand, speakers also recognized that transnational corporations, because of their size and power, could have particularly far-reaching effects on the enjoyment of human rights and so deserved special attention in the guidelines.

There was general agreement that the draft guidelines should be binding in some way. Speakers emphasized that States had the primary obligation to promote and protect human rights. However, given the increasing role of transnational corporations in the lives of people, and the diminishing power of the State in the face of these corporations, it would be appropriate to study different means of ensuring that transnational corporations respected human rights.

In order to encourage further comments on the draft guidelines, some speakers encouraged their wide circulation. Others believed that while comments should be encouraged, the draft guidelines should not be officially circulated until the working group, the Sub-Commission and the Commission had agreed to do so.

Most speakers called for the mandate of the working group to be extended for another three years.

Introduction

1. In accordance with its resolution 1998/8, the Sub-Commission on the Promotion and Protection of Human Rights established in 1999, for a period of three years, a sessional working group to examine the working methods and activities of transnational corporations. The 2001 session of the working group was the third and final year of this mandate.

2. The following experts were appointed as members of the working group: Mr. El-Hadji Guissé (Africa), Mr. Soo-Gil Park (Asia), Mr. David Weissbrodt (Western Europe and other States), Mr. Miguel Alfonso Martínez (Latin America), and Mr. Vladimir Kartashkin (Eastern Europe).

3. The working group held three public meetings during its third session, on 31 July, 2 August and 8 August 2001.

4. Mr. El-Hadji Guissé was elected Chairperson-Rapporteur.

5. The following members or alternates of the Sub-Commission who were not members of the working group also attended the meetings: Ms. Erica-Irene Daes, Mr. Asbjørn Eide, Mr. Alfonso Gómez-Robledo Verduzco, Mr. Fan Guoxiang, Ms. Françoise Hampson, Mr. Louis Joinet, Mr. Fried van Hoof, Ms. Iulia Antoanella Motoc, Mr. Joseph Oloka-Onyango, Mr. Godfrey Bayour Preware, Mr. Soli Jehangir Sorabjee, Ms. Zoshiko Terao, Ms. Halima Embarek Warzazi, Mr. Fisseha Yimer and Ms. Leila Zerrougui.

6. The following specialized agency was represented at the session of the working group: International Labour Organization.

7. Representatives of the following non-governmental organizations in consultative status with the Economic and Social Council also participated in the meetings of the working group, American Association of Jurists, Environmental Organisation for Argentina, Europe-Third World Centre (CETIM), Human Rights Watch, Indian Movement "Tupaj Amaru", International Commission of Jurists, International Confederation of Free Trade Unions, Lawyers Committee for Human Rights, Minnesota Advocates for Human Rights, Pax Romana and World Organisation against Torture. Individuals and organizations not in consultative status also participated in the working group's debates.

8. The working group had adopted the following agenda in 1999 for the duration of its mandate:

1. Election of officers

2. Adoption of the agenda

3. Activities of transnational corporations

4. Present standards and standard-setting activities

5. Conclusions and recommendations

6. Recommendations for the future work of the working group on the effects of the activities of transnational corporations on human rights, including the right to development and the right to a healthy environment

7. Adoption of the report of the working group to the Sub-Commission.

9. The working group had the following documents before it for discussion: (a) a working paper drafted by Mr. Guissé entitled "The realization of economic, social and cultural rights and the question of transnational corporations" (E/CN.4/Sub.2/2001/WG.2/WP.3); (b) a working paper drafted by Mr. Eide entitled "Corporations, States and human rights: a note on responsibilities and procedures for implementation and compliance" (E/CN.4/Sub.2/2001/WG.2/WP.2); and (c) a working paper drafted by Mr. Weissbrodt entitled "Draft universal human rights guidelines for companies" (E/CN.4/Sub.2/2001/WG.2/WP.1 and Add.1-3) containing the draft guidelines themselves, background information, a list of existing sources of international standards drawn on in the preparation of the draft principles, and the report of a seminar to discuss the draft guidelines held in Geneva from 29 to 31 March 2001. The working group also had before it the reports of its first and second sessions (E/CN.4/Sub.2/1999/9 and E/CN.4/Sub.2/2000/12). Finally, the working group also received during its session written technical comments on the draft guidelines from the International Labour Office.

10. The practice of prior sessions of opening all of the agenda items for discussion simultaneously was adopted. Speakers were given the opportunity to make interventions on one or more agenda items at the same time.

I. IMPACT OF TRANSNATIONAL CORPORATIONS ON THE ENJOYMENT OF CIVIL, CULTURAL, ECONOMIC, POLITICAL AND SOCIAL RIGHTS

11. The Chairperson-Rapporteur presented his working paper on the impact of the activities of transnational corporations on the enjoyment of economic, social and cultural rights.

12. Mr. Guissé began by noting that transnational companies had not to date been precisely defined. At the present state of work on this subject, no one had been able to put forward a definition acceptable to all. Three different concepts had emerged generally in the international discussions on this subject. One definition, favoured by some from Western industrialized countries, would make the definition broad enough to encompass all types of business enterprises. A second approach, favoured by the then Soviet Union and similar parties, would make a clear distinction between transnational companies and foreign investment companies. A third concept, favoured by many developing countries, would stress the relative power of the company. The size of the enterprise, measured by some agreed upon parameters, would define when a company had become transnational under this approach.

13. Transnational enterprises and corporations had clearly played an important role in globalizing the world economy. The important question was how to incorporate respect for

human rights into the actions of the transnational enterprises. It was thus incumbent upon States to regulate transnational operations in the light of their national interests and within their existing resources.

14. Mr. Guissé then noted the effects of the activities of the TNCs on a variety of economic, social and cultural rights, focusing on a few of the rights detailed in his working paper. These included community rights, such as the right to a clean environment, and individual rights, such as the rights to education, health and employment. The working paper discussed several approaches relating to the activities of TNCs and the relationship between the different rights. However, he cautioned that the treatment of this subject in his working paper was not an exhaustive catalogue.

15. The Chairperson-Rapporteur stressed that it was the effect of the activities of TNCs on individual rights that was most important. The primary objective of the working group was not to formulate voluntary or binding norms with regard to TNCs. The real mandate was to study the impact of their activities on the enjoyment of human rights and to examine the extent of States' obligations in that regard. It was only after a detailed study of those areas that it would be possible to evaluate what measures could be taken and to make recommendations and proposals for action on that basis, such as the eventual elaboration of a legal instrument, the nature and content of which still needed to be determined.

16. Illicit international activities which might involve the responsibility of States vis-à-vis other States or the international community were State crimes. According to the International Law Commission, they could be grave transgressions of human rights. Where international responsibility or liability of a State was present, violations could involve the criminal and/or civil liability of individuals or bodies within the State if those parties committed a serious crime.

17. To date, the natural subjects of international law have been States first of all. TNCs must operate within that legal framework. In other words, TNCs must comply with national law, as supplemented by international law. Mr. Guissé noted that the discussion in the working group could not go outside this framework.

18. Mr. Guissé recommended that the working group therefore consider two different frameworks: first, a preventive framework that would avoid violation of individual human rights by the activities of TNCs; it was incumbent upon the international community and States to create a body of preventive rules for that purpose. Second, a framework could be developed to address international and domestic means of ensuring that the behaviour of TNCs included a social aspect.

19. Mr. Guissé concluded by urging caution in defining the legal basis on which to challenge the responsibility of TNCs. He recognized that many of the participants would like a binding legal instrument to be developed. Yet that would depend a great deal, or perhaps even exclusively, on the good will of States. States were the only entities that could impose rules and regulations on the behaviour of TNCs. Any guidelines developed by the working group should be binding so as to avoid what had happened in the past with voluntary codes.

II. DRAFT PRINCIPLES RELATING TO THE HUMAN RIGHTS CONDUCT OF COMPANIES

20. Mr. Eide then presented his working paper on "Corporations, States, and human rights: a note on responsibilities and procedures for implementation and compliance".

21. Mr. Eide began by explaining how his paper complemented the framework proposed by Mr. Guissé in his presentation. He agreed that States held international obligations which must be borne in mind. He added the need to distinguish between the host State (where the transnational corporation was operating) and the home State (where the corporation has its headquarters). Both States had obligations, but the obligations of the host State were much more clear under present law. From the way that international law had evolved, it was clear that each State had the primary obligation to ensure that persons or parties operating within its borders complied with human rights standards. The working group was mandated to discuss the obligations of TNCs within the framework of public international law. Also, in the host State, while the obligations on the host State were clear, the capacity and sometimes the will to control the activities of TNCs properly was lacking. The attraction of foreign investments might be such that the host State was ready and willing to forgo some safeguards.

22. With respect to the legal nature of the guidelines or principles, Mr. Eide noted that Mr. Weissbrodt had done good work, but that was only one step in the process. Those types of draft guidelines could serve two purposes: first, to intensify the work of civil society by holding corporations morally responsible until binding legal standards were developed. Second, draft guidelines helped to clarify the obligation of host States as to what they should include in their own legislation, and to make such standards legally binding under their own legal systems.

23. Mr. Weissbrodt then presented his working paper, "Draft universal human rights guidelines for companies", and its background material.

24. Mr. Weissbrodt began with some preliminary comments. Last year the working group had decided to prepare legally binding standards. He believed the present draft accomplished that task. In addition, his working paper proposed a large number of possible implementation procedures for the draft standards. Those guidelines did not reflect an entirely voluntary code of conduct. He urged a careful reading of the text for those who were concerned that they were not binding enough.

25. Mr. Weissbrodt drew attention to some developments that had taken place during the past year. One was an international seminar, held in Geneva in March 2001. In which nearly all the members of the working group had participated. The findings of the seminar were to be found in addendum 3 to the working paper.

26. As a result of comments made during the last session of the working group, comments received during the March 2001 seminar and comments from many others received during the year, he had again revised the draft standards substantially, including a change of the title to "draft guidelines". There was also a new preamble which defined the background and text more fully. The guidelines themselves had been radically shortened. Each section began with a

general principle. That approach was meant to aid in the clarification and interpretation of the section. Commentaries also were added to make more specific reference to the relevant international standards.

27. Mr. Weissbrodt indicated that some of the issues that remained unresolved were whether the guidelines should apply only to transnational corporations or to all business enterprises. That subject had been much debated at the last session of the working group. No consensus had emerged. The great majority of comments he had received during the year favoured the broadest possible application of the standards. That position reflected the concern that if the guidelines were to be limited only to transnational corporations, it would be very difficult to draft a definition of transnational corporations that would be workable. An inadequate definition would permit companies to structure themselves in such a way as to circumvent the definition. Transnational corporations, however, needed to continue to be a special focus of the working group.

28. Mr. Weissbrodt commented on some of the possible methods of implementing the standards. Companies might be required to produce impact statements. Unions could use the guidelines in negotiating collective bargaining agreements with employers. NGOs could use the guidelines to review and evaluate corporate conduct. The guidelines could also be used as a standard for ethical investment. Similarly, the draft could form the basis for model legislation, and could be used by courts who might refer to them in their decisions. In some countries, the guidelines might be relevant in determining liability. In some contexts, criminal liability might be imposed for violating them. In the United Nations, treaty bodies could use them in interpreting treaty obligations. The United Nations could use them as a basis for its own procurement decisions. Country rapporteurs or thematic procedures of the Commission on Human Rights could use the draft guidelines when raising concerns in their reports. The working group or a successor group could also monitor compliance by reviewing information from NGOs and other groups.

General comments by members of the working group, other experts of the Sub-Commission and others

29. One expert member of the Sub-Commission thanked all three authors of the working papers for their hard work. It was obvious that Mr. Guissé's work was the necessary starting point. It was not possible to present draft guidelines without having first voiced the reasons for making a code of conduct mandatory. It was important for the Sub-Commission to prepare a mandatory code of conduct. Mr. Weissbrodt's work was excellent. The work of the working group should continue beyond the terms of the mandate.

30. An individual indicated he had for the last 10 years been Chair of an NGO business group in the United Kingdom. The group's objective was to persuade businesses to adopt practices which promoted and respected human rights. The challenge was to implement the guidelines in their full scope. TNCs could be vitally important for human development; they touched individuals in a more continuous and intimate way than Governments could. Corporations should therefore be more accountable. A comprehensive, authoritative text like the

draft before the working group was needed and only the United Nations could produce such a text. The current draft was very useful. The speaker looked forward to eventual mandatory guidelines but also emphasized the need for consensus.

31. An expert indicated his support for the broadest possible application of the draft guidelines to all businesses, not just transnational corporations. For example, some of the big oil corporations were national corporations, not transnational corporations. Often, the activities of national corporations were similar and had similar effects to those of TNCs.

32. Another expert supported the term "companies" rather than "transnational corporations". Sometimes "transnational corporations" were better employers and citizens than some local companies. The guidelines needed to apply to all of them. Second, the term "guidelines" implied non-binding. If the idea was that the content of the text should be binding, the name of the proposal needed to be changed. It was suggested to use the term "principles". The expert noted that the term "universal" was odd as it implied that the draft guidelines would operate only in the international sphere. The expert recommended that the term "fundamental" as more appropriate. As far as the status of the guidelines was concerned, the expert indicated she was torn between a soft law and a hard law approach. So-called soft law could be much more detailed and more binding than a binding legal instrument. In view of the need for speed, the expert suggested that there might be a clear advantage in seeking a soft law code.

33. The expert noted that the issue was what should be done with the principles. She suggested that the Sub-Commission send the instrument to all treaty bodies which would call States to account; in that case it would be helpful if the treaty bodies would report back to the Sub-Commission on their experiences. In addition, the expert recommended that the principles be sent to the World Bank, the IMF and the WTO and that they be invited to report to the Sub-Commission annually. Further, the expert noted that enforcement mechanisms were also needed

General comments by a specialized agency

34. The representative of the ILO noted that the competent bodies of the organization would certainly look with interest at the guidelines and wish to express their comments and concerns. It was hoped that the timetable for the finalization of the draft guidelines would leave room for that possibility.

35. The guidelines should recognize the ILO as the monitoring agency for labour regulations. The speaker noted the far-reaching impact of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The principles, which had been adopted within the United Nations system, were available for all ILO member States. They applied both in home and host countries. They also applied to multinational corporations themselves. The principles aimed to encourage positive contributions to economic and social progress, as well as to minimize and resolve difficulties that might arise. Implementation measures could be found in the memorandum submitted by the International Labour Office to the fifty-third session of the Sub-Commission (E/CN.4/Sub.2/2001/24).

36. The Tripartite Declaration covered many of the same areas as the draft guidelines the working group was reviewing. These included non-discrimination in employment, elimination of forced and child labour, freedom of association, employment promotion and security, wages, conditions of work and life, and industrial relations. Relevant ILO standards provided the uniform normative benchmark.

37. The Office noted that a number of specific provisions of the draft guidelines fell short of existing ILO standards.

38. Subject to the above comments, and in a spirit of contribution, the ILO representative indicated that the ILO was prepared to provide additional, more detailed technical comments on the draft guidelines, in writing, to the United Nations Secretariat. In addition, it would remain at the disposal of the working group for further consultation and discussion.

NGO comments

39. An NGO representative drew attention to the relationship between the activities of companies and human development. Nation States had traditionally dominated history but now companies were acquiring more important political powers than some States.

Comments by members of the working group and other experts of the Sub-Commission

40. A Sub-Commission expert noted that one concern was implementation. Host countries tended to be small while home countries were bigger. Transnational corporations could overwhelm a small country's enforcement mechanisms. Home countries should take more responsibility for the implementation of standards. In order to make companies comply with human rights norms, it was very important to set up an appropriate mechanism.

NGO comments

41. Another NGO speaker noted that his organization felt that the draft guidelines as currently drafted were not binding, and stated that articles 18 to 20 were problematic. He recommended that the working group request a prolongation of its mandate and that it be charged with establishing an international legal framework for surveillance and monitoring of TNC activities.

Comments by members of the working group and other experts of the Sub-Commission

42. Mr. Weissbrodt expressed his gratitude for the comments made by an NGO representative on article 20. His intent in article 20 had been to guarantee that the cited standards would be minimum standards for company compliance. If companies wished to impose higher standards, they were free to do so. If that was not clearly expressed he would be happy to clarify article 20 to make this point more clear. Another expert noted that the NGO comments on articles 18-20 were based on a misunderstanding of the text.

NGO comments

43. Another NGO representative felt that the working group had not yet found its path. Transnational corporations had their own specificities. They might be subject to one or more jurisdictions. This was one of the central problems that should be studied by the working group. Another aspect of TNCs was their enormous power. They adjusted to changes in the beliefs and social patterns of human beings. All of these set them apart from national companies. For the time being there were no international tribunals which could regulate transnational corporations. Binding law required two essential characteristics: first, it must be complied with by all and second, it must be legally enforceable in a court.

44. The working group should fulfil all the elements of the mandate given to it by the Sub-Commission in paragraph 4 of its resolution 1998/8, especially items (d) and (f). It should make recommendations and proposals to the international community and States in order (a) to place TNCs within the framework of international and national human rights norms currently in force (civil, cultural, economic, political, social and environmental rights); (b) to ensure that TNCs answer to the competent jurisdictions in case of violation of these norms. By its recommendations and proposals, the working group should also consider ways to fill the normative and legal gaps existing in this matter.

45. Another NGO speaker indicated that he represented an indigenous group. He noted that no one could escape the effects of TNCs. According to a report published in 1999 by the United Nations Conference on Trade and Development, the 100 largest TNCs together had assets of $1.8 billion and sold products worth $2.1 billion, while employing 6 million persons in their subsidiaries; 90 per cent of the top 100 companies are from the West. His group recommended that the experts (a) place greater emphasis on the overall negative effect of TNCs, particularly on the right to development; (b) define the property rights and economic rights of TNCs; (c) investigate the illegal transfer of capital, in the form of interest and profit-taking, from poor to rich countries; (d) determine the legal nature of mergers between firms and banks and media leading to large monopolies; (e) consider the regulation of international financial institutions; (f) evaluate the involvement of TNCs in corruption; and (g) evaluate the activities of TNCs on the human rights of indigenous peoples.

Comments by members of the working group and other experts of the Sub-Commission

46. Another Sub-Commission expert noted that while there had been advances, the mandate of the working group had not yet been completely fulfilled. The group had been tasked with examining the activities and impact of TNCs on human rights. The group had also been asked to analyse the compatibility of the various human rights instruments with the various investment agreements. She did not think it had done either. The expert also questioned whether the draft guidelines document was included in the mandate of the working group as it purported to apply to all companies, not just TNCs. Finally, the expert noted that the draft guidelines were not binding.

47. Mr. Weissbrodt, responding to several of the comments made by NGO representatives and others, noted that there was a high degree of consistency in the objectives expressed, namely to ensure that the activities of corporations and transnational corporations promoted and protected human rights. Now the question was how to achieve that objective. He believed that the mandate of the working group certainly encompassed the draft that he had prepared. Mr. Weissbrodt acknowledged that there were aspects of the mandate that had not been accomplished. However, if the working group dealt with only transnational corporations, those entities would be able to use legal tactics to avoid implementing the guidelines. There was no agreed definition of transnational corporations that would avoid this problem. Therefore, in order to fulfil the task in paragraph (d) of the working group's mandate, there was a need for legally binding standards that applied to all companies.

48. Another Sub-Commission expert noted that while the working group was mandated to evaluate the impact of TNCs - which was of course addressed in the working paper by Mr. Guissé - it should also look at the procedures by which TNCs could best be held accountable. On the issue of binding and non-binding standards and how the standards could be made binding, for the time being the direct responsibility of TNCs was difficult to prove. On the other hand, it was possible to prove the direct responsibility of States, particularly host countries. But, as another expert noted, States were sometimes too weak or too focused on attracting investment and could not stand up to TNCs. For that reason, ways must be found to implement the guidelines. There had been developments in this area in the Organization for Economic Cooperation and Development as well as the European Union. These were at an early stage. The draft guidelines could be a step in that process. The working group needed to determine what the other steps in that process were and to look at the compatibility of the guidelines with existing standards. In that regard, it was important to ensure that the guidelines did not fall below existing standards. The expert agreed the mandate of the working group should be extended.

49. Another expert addressed the question of the mandate of the working group. If the working group were confined only to transnational corporations, it could only examine issues particular to TNCs and not issues that affected all corporations. In order to examine comprehensively the conduct of all companies, it would be necessary to deal with both. Second, the expert noted that TNCs were already using company structures to avoid liability, which was an added reason for the guidelines to apply to all corporations. Third, there was a need to ensure that companies were effectively called to account.

50. Another expert noted that national companies were already under national jurisdiction and within national borders. TNCs were the ones that carried out their activities beyond borders. This was why another instrument should be added to the international framework.

51. Another expert was in favour of the draft guidelines containing some mandatory standards for all companies. At the same time, the working group needed to recognize that many of the provisions would be unacceptable to companies. The expert believed the draft guidelines should apply to all companies. However, it would be desirable to include definitions of transnational corporation, national company, etc., in the document. In some cases, there might

be different sets of rights applicable to certain categories of companies. He also thought that the draft guidelines should be sent to parties both inside and outside the United Nations system for comment. There would be a better chance of improving the content of the draft and to draft a document which would ultimately be acceptable to everyone.

52. Another expert commended the excellent work done on a difficult topic. Unfortunately, there was no full-fledged enforcement mechanism available internationally applicable to non-State actors. On the subject of binding standards, if the working group took the position that the standards were already binding, the question arose of how to focus on the practical issues. This was not a matter of principle, but of strategy and tactics. One position was that it would be necessary to draft a so-called soft law document, because a hard-law document would be impractical under the circumstances.

53. Another expert commented that non-binding "recommendations" in a document such as the present draft would not be effective. There must be some sanctions. Also, he noted that it would not be wise to try to distinguish between transnational and national companies. The expert strongly recommended that the right to self-determination not be included in the draft guidelines owing to its complicated nature.

NGO comments

54. A representative from an NGO noted that human rights violations were increasingly of a global nature. He noted that the accountability of non-State actors was one of the most important issues needing to be to addressed. Private businesses had expanded over the years. Substandard working conditions existed, including exposure of workers to toxic chemicals. Until recently almost all global manufacturers took no responsibility for their subcontractors, which were often located in Asian and other developing countries. He noted an urgent need for practical enforcement. He felt that a variety of stakeholders must be engaged for the working group to be effective. Some of the most basic human rights documents had started out as the same type of soft law, including the Universal Declaration of Human Rights itself. The working group should be encouraged to find further implementation procedures. He identified three areas for further research: first, the examination of methods used by NGOs and independent organizations to monitor corporate human rights violations; second, the creation of a forum within the United Nations; third, subsequent papers to be requested by the Sub-Commission.

55. Another NGO representative indicated that today most businesses paid at least lip service to human rights; however, not in countries where they invested. The representative saw the draft guidelines as a positive step towards developing binding standards. Some corporations might argue that they would be at a competitive disadvantage if they adhered to standards when others did not. The extension of the working group's mandate would also enable it to build upon paragraph (a) of its mandate to identity and examine the effects of TNC activities.

56. A representative from another NGO noted that she had served as Rapporteur at the March 2001 seminar and she wished to summarize the key findings of the seminar. Forty-six people, including five members of the Sub-Commission, had participated, representing a diverse cross-section of business and academic experts, non-governmental organizations and United Nations officials. Key findings included the need to maintain a broad focus in

developing standards for companies of all kinds, not only transnational corporations; to develop strong implementation procedures; and to move quickly to a product which could be used in the field and in human rights advocacy. The NGO representative strongly supported a three-year extension to the working group's mandate, an updating of all three working papers, and circulation of all three papers for comments. It would be extremely important to have a consensus-building process which was open and transparent to all interested groups in order to facilitate the success of the working group.

57. Another NGO representative indicated that his organization still believed that States retained the main obligation for the enjoyment of human rights, but noted that companies had obligations too. The draft guidelines provided a remarkable base. However, he drew the attention of the working group to the following. First, the draft guidelines did not expressly mention the Convention against Torture and Other, Cruel, Inhuman and Degrading Treatment or Punishment, yet company security guards had been accused of such practices. Second, the draft guidelines were also silent on required disclosure of security guard arrangements. There was at present a lack of transparency in contracts between private corporations and private security companies. Third, the working group should further develop the draft document with regard to implementation measures. The group should consider an independent monitoring mechanism. Fourth, the representative also favoured applying the standards to all companies. That would help guarantee a level playing field and would put States and host States back into the equation.

58. In recent years, another NGO representative noted, considerable attention had been given to corporations and their failure to respect human rights in countries where they carried out their activities. Transnational corporations were often notorious. The extent and complexity of their operations made them difficult to regulate. Assessing the extent to which international standards were directly binding on companies was of crucial importance. The NGO representative welcomed the endeavours of the working group to clarify the international human rights obligations of companies, whether transnational or national. The representative acknowledged that TNCs had specific characteristics that might require specific attention. However, national companies also violated human rights. Human rights were universally recognized, thus enforcement must be universal. The NGO representative preferred a binding instrument, rather than soft law. He acknowledged, however, the difficulty of pursuing that goal immediately; it should, however, be the ultimate goal. The level playing field argument was forceful and convincing. As mentioned by one of the Sub-Commission's experts, experience should be drawn from sources such as the United Nations Standard Minimum Rules for the Treatment of Prisoners.

III. RECOMMENDATIONS FOR FUTURE WORK OF THE WORKING GROUP

59. The working group then took up the subject of its future work.

60. The group recommended that its mandate be extended for a further three-year term and that each of the authors of the working papers be encouraged to update his work for the next session.

61. There was a general consensus in the working group on the need for the norms concerning transnational corporations to be enforceable in order to be effective and that the primary obligations of States in that area must also constantly be borne in mind. It was recognized that there were different possible methods for achieving this. It was agreed that much more discussion was needed to identify the best method or methods for the implementation of standards.

62. It was also noted that the sessions of the working group were public and open-ended. All interested parties were encouraged to attend and participate in future sessions.

IV. ADOPTION OF THE REPORT

63. The present report was adopted by the working group at its meeting on 8 August 2001.